92-1212

No. _____

Supreme Court, U.S.
FILED
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IN THE

# *Supreme Court of The United States*

October Term, 1992

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NO NAME VIDEO, LTD.
AND
SATTERFIELD INC., T/A
ACCOUNTING ASSOCIATES
AND / OR MS ENTERPRISE,

*Petitioners,*

*VS.*

THE UNITED STATES OF AMERICA
AND
SPECIAL AGENT W. DONALD BELL,

*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCURT

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fourth Circuit in its appellate review of the case at bar erred, as a matter of law, in applying a legal standard which is in conflict the prevailing standard applied in the majority of Circuit Courts of Appeals and which requires a recipient of an Internal Revenue Service ("IRS") administrative summons ("summons") to allege "particularized facts" of IRS bad faith in order to be entitled to an evidentiary hearing in the context of an IRS summons enforcement action.

2. Whether the United States Court of Appeals for the Fourth Circuit in its appellate review of the case at bar erred in not remanding this case to the District Court with instructions to conduct an evidentiary hearing to determine if the Internal Revenue Service had issued a summons in bad faith and with the improper motive of harassing No Name Video, Ltd. and Satterfield Inc., t/a Accounting Associates and/or MS Enterprise.

TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented . . . . | i |
| Table of Authorities. . . . | iv |
| Opinions Below . . . . . | 2 |
| Jurisdictional Statement . . . | 3 |
| Statutory Provisions . . . | 3 |
| Statement of the Case . . . | 4 |
| Reason for Granting the Writ | |
| 1. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT SHOULD HAVE REVERSED THE JUDGMENT OF THE DISTRICT COURT TO THE EXTENT THAT IT REQUIRED THE PETITIONERS TO SHOW PARTICULARIZED FACTS OF IRS BAD FAITH AND REMANDED THE CASE TO THE DISTRICT COURT WITH INSTRUCTIONS TO CONDUCT AN EVIDENTIARY HEARING SINCE APPELLANTS HAD ALLEGED THAT THE IRS HAS ISSUED THE SUMMONSES IN AN EFFORT TO HARASS THEM . . . . . | 11 |
| I. OVERVIEW OF THE SUMMONS ENFORCEMENT PROCESS . . . . . | 11 |
| II. THERE IS A CONFLICT AMONG THE VARIOUS CIRCUIT COURTS OF APPEAL AS TO THE STANDARD TO BE APPLIED IN DETERMINING A PARTY'S RIGHT TO AN EVIDENTIARY HEARING IN A SUMMONS ENFORCEMENT ACTION WHICH THIS COURT IS URGED TO RESOLVE . . . . . | 14 |

III. THE DISTRICT COURT'S REFUSAL TO GRANT AN EVIDENTIARY HEARING DESPITE THE FACT THAT SHAPIRO'S NAME APPEARS ON A SECRET IRS "HIT LIST" AND THE OUTRAGEOUS AND IRRESPONSIBLE STATEMENTS OF APPELLATE OFFICER FRIEDMAN IS A CLEAR ABUSE OF DISCRETION WHICH THIS COURT, IN THE EXERCISE OF ITS SUPERVISORY POWER, IS URGED TO REDRESS . . . . . 17

Conclusion . . . . . 18

Certificate of Service . . . . 19

## TABLE OF AUTHORITIES

### Cases

Alphin v. U.S., 809 F.2d 236 (4th Cir. 1987) . . . . . 13,14,15

Hintze v. United States, 879 F. 2d 121, 128 (4th Cir. 1989) . . . . 9,14

Reisman v. Caplin, 375 U.S. 440 (1964) 12

United States v. Church of Scientology of Calif., 520 F.2d 818 (9th Cir. 1975) 15

United States v. Garden State National Bank, 607 F.2d 61 (3rd Cir. 1979) . . 14

United States v. Harris, 628 F.2d 875 (5th Cir.1980) . . . . . 15,16

United States v. Kis, 658 F 2d. 526 (7th Cir.1981) . . . . . 14

United States v. McCarthy, 514 F.2d368(3rd Cir.1975) . . . . . 15

United States v. Powell, 379 U.S. 48 (1964) . . . 9,12,13

United States v. Salter, 432 F.2d 697 (1st Cir.1970) . . . . . 15

### Statutes

26 U.S.C. Section 7602(a) . 11

No._____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

NO NAME VIDEO, LTD.

and

SATTERFIELD INC., T/A
ACCOUNTING ASSOCIATES
AND/OR MS ENTERPRISES,
Petitioners,

v.

UNITED STATES OF AMERICA

and

SPECIAL AGENT W. DONALD BELL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

PETITION FOR WRIT OF CERTIORARI

---

The Petitioners, No Name Video, Ltd. and Satterfield Inc., t/a Accounting Associates and/or MS Enterprises, respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States

Court of Appeals for the Fourth Circuit entered in this proceeding on October 19, 1992.

## OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is unreported in United States of America and Special Agent W. Donald Bell v. No Name Video, Ltd. and Satterfield Inc., t/a Accounting Associates and/or MS Enterprise, Civil Number H-91-1549. A copy of the applicable orders of the District Court are attached as Appendix A. The opinion of the United States Court of Appeals for the Fourth Circuit is unreported in United States of America and Special Agent W. Donald Bell v. No Name Video, Ltd. and Satterfield Inc., t/a Accounting Associates and/or MS Enterprise, Number H-91-2722. A copy of the opinion of the Court of Appeals is attached as Appendix B.

## JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Fourth Circuit was entered on October 19, 1992. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1). This Petition for a Writ of Certiorari has been timely filed in accordance with Rule 13 of the Rules of this Court.

## STATUTORY PROVISIONS

### 26 U.S.C. Section 7602(a)

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized-

(1) To examine any books, papers, records, or other data which may be relevant

or material to such inquiry;

(2) To summon the person liable for tax or to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry;and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

## STATEMENT OF THE CASE

### A. Factual History

Maria Satterfield ("Satterfield") is the

sole stockholder of No Name Video, Inc. ("Video") and Satterfield, Inc.(the "Company"). The Company is engaged in the business of performing accounting services, including the preparation of federal income tax returns ("returns"), for members of the public at large. Sanford R.Shapiro ("Shapiro") is Satterfield's husband, but is not associated with Video or the Company in any formal capacity; however, he admittedly performs certain ministerial acts for Satterfield and her businesses for which he receives no remuneration.

In March of 1983, Shapiro was convicted of filing false federal income tax returns for the years 1975 and 1976. Prior to his conviction, Shapiro had been engaged in the business of performing accounting services, including the preparation of returns, for members of the public at large.

The IRS maintains the names of certain income tax return preparers in a file which

it refers to as the "hit list". If an income tax return preparer's name appears on the "hit list", the IRS will examine every return which he or she prepares.

The IRS has placed Shapiro's name on its "hit list" and disclosed his status to Julie Winiarski ("Winiarski"), one of the Company's clients. The IRS advised Winiarski that it would examine any and all of her returns which the Company prepared, and urged her to employ a new accountant to prepare her returns. As a result of this conversation, Winiarski has expressed a strong reluctance to continue to use the Company as her accountant.

The foregoing facts were unrebutted by the IRS, supported by the affidavits of Satterfield, Shapiro and Winiarski and accepted by the courts below.

B. Procedural History

W. Donald Bell ("Bell") is a special agent with the criminal investigation

division of the Interval Revenue Service ("IRS") assigned to the IRS district office in Baltimore, Maryland. Allegedly, Bell is currently conducting a criminal investigation of Shapiro's federal income tax liabilities for the years 1986 through 1989. Bell suspects that Shapiro is somehow associated with Video and the Company and that his association constitutes a violation of the criminal provisions of the Internal Revenue Code.

In connection with his investigation of Shapiro, Bell has issued several administrative summonses to various third parties, including Video and the Company. The summons issued to the Company on March 26, 1991, commands the production, inter alia, of the Company's list of accounting clients. The Company refused to produce the records and the IRS commenced a summons enforcement action on June 4, 1991 in the United States District Court for the District

of Maryland, United States of America and Special Agent W. Donald Bell v. No Name Video, Ltd. and Satterfield Inc., t/a Accounting Associates and/or MS Enterprise, Civil Number H-91-1549 (the "enforcement action"), to compel compliance.

The United States filed a motion to enforce the summons, supported by Bell's affidavit, in the enforcement action. In his affidavit, Bell alleged:

> (a) that the summons was issued in connection with his investigation of Shapiro;
> (b) that the information sought was relevant to his investigation;
> (c) that the information sought was not already in the possession of the IRS; and
> (d) that he had complied with all relevant provisions of the Internal Revenue Code.

Bell also denied that Shapiro's case had been referred to the Justice Department. In summary, Bell's affidavit contained all of the allegations required to make a prima facie case for enforcement under United

States v. Powell, 379 U.S. 48 (1964).

The Company filed an opposition to the summons in which it alleged, inter alia, that the summons was issued in bad faith and in an effort to harass the Company and destroy its business. The Company's opposition was supported by the affidavits of Shapiro, Satterfield and, in large part, Winiarski. The Company requested an evidentiary hearing in an effort to show that the IRS had issued the summonses for an improper purpose. While assuming the truthfulness of the allegations set forth in the affidavits submitted by the Company, the Court nevertheless refused to conduct an evidentiary hearing, because it found that the Company had failed to "particularize . . . facts from which an inference may be drawn that the conduct of the IRS was improper," citing Hintze v. United States, 879 F. 2d 121, 128 (4th Cir. 1989).

The Company noted a timely appeal to the

United States Court of Appeals for the Fourth Circuit, United States of America and Special Agent W. Donald Bell v. No Name Video, Ltd. and Satterfield Inc., t/a Accounting Associates and/or MS Enterprise, Number 91-2722 (the "appeal") to challenge, inter alia, the District Court's refusal to conduct an evidentiary hearing. In its opinion, the Court of Appeals made the following observation:

> The Winiarski affidavit likewise fails to particularize facts supporting an inference of abuse. The affidavit states that during a meeting between the Winiarskis and IRS Appeals Officer Milton Friedman, Friedman told the Winiarskis that Shapiro was on a "hit list," explained as "a list of ten to twenty tax preparers whose client's returns were selected for examination by the Internal Revenue Service on the sole basis . . . that those on the "hit list" were the preparers." According to the affidavit, Mr. Friedman told the Winiarskis that it would be in their best interests to have someone else prepare their returns. As a result of the statements from Mr. Friedman, Winiarski stated that she is "extremely concerned about continuing to use Accounting Associates as my accountants." While there may be some

incidental loss to appellants' businesses by virtue of the IRS investigation of Shapiro, such loss is merely speculative and is not evidence that the IRS is pursuing its investigation of Shapiro in bad faith.

Finding that the corporations have not come forth with particularized facts of bad faith by the IRS in issuing summonses to the corporations, we cannot conclude that the district court abused its discretion or committed "clear error" in enforcing the summonses without a hearing.
(Emphasis added)

## REASONS FOR GRANTING THE WRIT

1. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT SHOULD HAVE REVERSED THE JUDGMENT OF THE DISTRICT COURT TO THE EXTENT THAT IT REQUIRED THE PETITIONERS TO SHOW PARTICULARIZED FACTS OF IRS BAD FAITH AND REMANDED THE CASE TO THE DISTRICT COURT WITH INSTRUCTIONS TO CONDUCT AN EVIDENTIARY HEARING SINCE APPELLANTS HAS ALLEGED THAT THE IRS HAS ISSUED THE SUMMONSES IN AN EFFORT TO HARASS THEM.

### I. OVERVIEW OF THE SUMMONS ENFORCEMENT PROCESS

The IRS is authorized under 26 U.S.C. Section 7602(a) to issue summonses requiring the appearance of witnesses and compelling

the production of documents and/or testimony for any legitimate purpose, including the investigation of suspected violations of the criminal statutes of Title 26 of the United Stated Code. Nevertheless, a summons is not self-executing and if the recipient of a summons refuses to comply, the IRS will be required to commence a summons enforcement action in the appropriate United States District Court in order to secure compliance with the summons. See, Reisman v. Caplin, 375 U.S. 440 (1964).

When the United States seeks judicial enforcement of a summon, it must prove

> [1] that the investigation will be conducted pursuant to a legitimate purpose,
> [2] that the inquiry may be relevant to that purpose,
> [3] that the information sought is not already within the Commissioner's possession, and
> [4] that the administrative steps required by the Code have been followed . . . . See, Powell at 57-58.

The summons recipient may "challenge the summons on any appropriate ground." Id. at

58. When the government commences a summons enforcement action, "a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." Id. It is generally conceded that the government's burden is very light and it may rely on the affidavit of the agent who issued the summons to establish a prima facie case that it had satisfied the four Powell standards. See, e.g., Alphin v. U.S., 809 F.2d 236 (4th Cir. 1987).

Once the government has established its prima facie case, the summons recipient bears the heavy burden of disproving the actual existence of a valid civil tax determination or collection purpose. Id. An important issue associated with this stage of the

summons enforcement proceeding is whether the summons recipient is entitled to an evidentiary hearing. This petition focuses on this narrow, but most important issue.

## II. THERE IS A CONFLICT AMONG THE VARIOUS CIRCUIT COURTS OF APPEAL AS TO THE STANDARD TO BE APPLIED IN DETERMINING A PARTY'S RIGHT TO AN EVIDENTIARY HEARING IN A SUMMONS ENFORCEMENT ACTION WHICH THIS COURT IS URGED TO RESOLVE.

During the course of the proceedings below, the government has relied heavily on two cases decided by the Fourth Circuit Court of Appeals: Hintze v. IRS, 879 F. 2d 121 (4th Cir. 1989); and Alphin v. United States, 809 F.2d 236 (4th Cir. 1987). These two decisions adopt the standard followed in the Seventh Circuit See, United States v. Kis, 658 F 2d. 526 (7th Cir.1981)) and, allegedly, in the Third Circuit See, United States v. Garden State National Bank, 607 F.2d 61 (3rd Cir. 1979)). In these Circuits, the summons recipient is entitled to an evidentiary

hearing if and only if he or she alleges "specific facts . . . supported by affidavits, from which the court can infer a possibility of some wrongful conduct by the IRS. . . . Mere allegations of bad faith will not suffice." See, Alphin at 238.

On the other hand, in the First Circuit See, United States v. Salter, 432 F.2d 697 (1st Cir.1970), the Third Circuit See, United States v. McCarthy, 514 F.2d368(3rd Cir.1975), the Fifth Circuit, See, United States v. Harris, 628 F.2d 875 (5th Cir.1980) and the Ninth Circuit See, United States v. Church of Scientology of Calif., 520 F.2d 818 (9th Cir. 1975) allegations of bad faith without specific factual allegations suffice and the summons recipient is permitted to examine the IRS agent at an evidentiary hearing. The rationale for this standard is explained in Harris as follows:

> [A] taxpayer is not always entitled to discovery before the summons

> enforcement hearing. Therefore it is appropriate to allow the adversary hearing even though the taxpayer has only alleged, without providing a supporting factual background, that the summons was issued for an improper purpose. Otherwise the taxpayer might be placed in the unfair dilemma of having to provide supporting facts, but having no way to obtain those facts. See, Harris, footnote 6 at 880.

It is illogical to impose upon a litigant a burden which is extremely difficult to fulfill and then to deny that same litigant any meaningful opportunity to rebut the government's case. In a majority of the jurisdictions which have considered this issue, the summons recipient is entitled to an evidentiary hearing, the scope of which the presiding trial judge will control, upon alleging bad faith on the part of the IRS and

without the necessity of alleging particularized facts relating to the IRS motivation. The particularized showing required by the Fourth Circuit and a minority of other jurisdictions represents an aberration which this court, in the exercise of its discretionary appellate jurisdiction, is urged to eliminate.

## III. THE DISTRICT COURT'S REFUSAL TO GRANT AN EVIDENTIARY HEARING DESPITE THE FACT THAT SHAPIRO'S NAME APPEARS ON A SECRET IRS "HIT LIST" AND THE OUTRAGEOUS AND IRRESPONSIBLE STATEMENTS OF APPELLATE OFFICER FRIEDMAN IS A CLEAR ABUSE OF DISCRETION WHICH THIS COURT, IN THE EXERCISE OF ITS SUPERVISORY POWER, IS URGED TO REDRESS

Even if this Court chose to adopt the "specific facts" standard employed by the Fourth Circuit and a minority of other jurisdictions, the District Court's refusal to conduct an evidentiary hearing in light of the specific facts alleged in the affidavits is a clear abuse of discretion. The IRS has admitted

(1) that it has placed Shapiro's name

on a secret "hit list";
(2) that it plans to audit every return prepared by the Company;
(3) disclosing Shapiro's status and its audit plan to a client of the Company; and
(4) encouraging the client to change to another accountant.

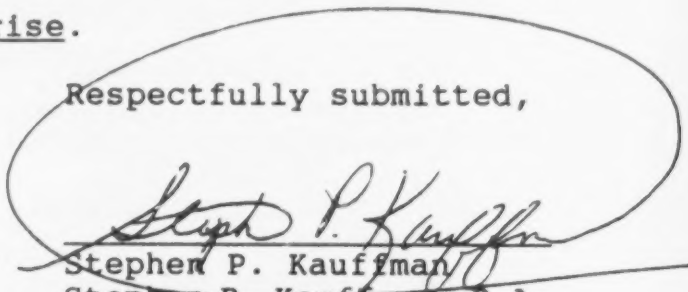
These admissions coupled with Bell's request for the Company's client list are ample support for the Company's allegations that the IRS is engaged in a campaign of harassment designed to destroy its business. Furthermore, absent this Court's exercise of its supervisory power, the Company is powerless to halt the malicious destruction of its business and goodwill and has no effective remedy to recover compensation for the loss which it is certain to incur.

## CONCLUSION

For the foregoing reasons, Petitioners pray that this Court grant a Petition for Writ of Certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in

United States of America and Special Agent W. Donald Bell v. No Name Video, Ltd. and Satterfield Inc., t/a Accounting Associates and/or MS Enterprise.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Stephen P. Kauffman, a member of the bar of the Supreme Court of the United States and counsel-of-record for the Petitioners, No Name Video, Ltd. and Satterfield Inc., t/a Accounting Associates and/or MS Enterprise, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy

of this Petition for Writ of Certiorari upon the Respondents by depositing a copy of the same in the United States mail with proper address and adequate postage to:

The Attorney General
Department of Justice
Washington, D.C. 20044

The Solicitor General
Department of Justice
Washington, D.C. 20044

Gary Allen, Esq.
Chief Appellate Section
Tax Division
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W. Donald Bell
IRS
P.O. Box 1402
Baltimore, Maryland 21203

This 18th day of January, 1993.

Stephen P. Kauffman

**APPENDIX A**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| UNITED STATES OF AMERICA and SPECIAL AGENT W. DONALD BELL, | ) | |
| Petitioners | ) | |
| vs. | ) | Civil No: 91-1549(H) |
| NO NAME VIDEO, LTD., 109 Briarcliff Lane Bel Air, Maryland 21014, and | ) | |
| SATTERFIELD INC., T/A ACCOUNTING ASSOCIATES and/or MS ENTERPRISES 109 Briarcliff Lane Bel Air, Maryland 21014, | ) | |
| Respondents | ) | |

O R D E R

Upon motion of the United States of America and Special Agent Donald Bell, the defenses to the petition which are raised in the response having been decided by this Court in an oral opinion rendered in open court and an order having been entered enforcing the summonses at issue in Civil Nos. H-91-933 and H-91-1223 on July 12, 1991, it is hereby

ORDERED that the summonses served on No

Name Video Ltd, for records of No Name Video for the period January 1, 1986 through January 31, 1990 and on Satterfield Inc., d/b/a Satterfield Associates for the records of Satterfield Inc. for the period January 31, 1986 through January 31, 1990 are hereby enforced and that the respondents are to comply with the terms of the summonses and a representative of the respondents must appear with the records at the time and place set by Special Agent W. Donald Bell.

Dated this 12th day of September, 1991.

_____

ALEXANDER HARVEY II
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND
BALTIMORE, MARYLAND 21201

ALEXANDER HARVEY II
SENIOR JUDGE

September 12, 1991

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Re: United States of America, et al.
v. No Name Video, Ltd., et al.
Civil No. H-91-1594

Gentlemen:

Presently pending in this civil action is the government's motion to enforce summonses issued by the Internal Revenue Service ("I.R.S.") and served on respondents No Name Video, Ltd. and Satterfield Inc., T/A Accounting Associates and/or MS Enterprises. These summonses were issued pursuant to an I.R.S. investigation into the potential tax liability of Sanford R. Shapiro.

The government contends that the issues raised by its motion are identical to those resolved in favor of the government by this Court on July 11, 1991 in Sanford R. Shapiro v. United States, Civil Nos. H-91-933 and H-91-1223. On that date, following a hearing and argument

presented by counsel in open Court, the Court rendered an oral opinion denying Shapiro's motions to quash subpoenas and granting the government's motions to enforce. The government asserts that the doctrine of collateral estoppel requires that its motion in this case be granted.

In opposition to the pending motion, respondents contend that they have no business relationship with Shapiro and that the summonses at issue are overbroad and have been issued for purposes of harassment. Respondents accordingly request that enforcement of the summonses be denied, or, in the alternative, that all reference to their clients be excised from the summonses.

At the July 11 hearing, this Court did not rule on the summonses at issue in this case because respondents had not yet answered or opposed the government's petition for enforcement. As noted, the Court did grant motions to enforce the five summonses at issue in Civil Nos. H-91-933 and H-91-1223. Respondents' opposition in Civil No. H-91-1549 has now been filed, and the government's motion to enforce summonses is now ripe for resolution.

On the record in this case and in that developed in Civil Nos. H-91-933 and H-91-1223, this Court concludes that respondents have failed to rebut the government's prima facie case for enforcement. See United States v. Powell, 379 U.S. 48, 57-58 (1964); Hintze v. United States, 879 F.2d 121, 128 (4th Cir. 1989); Alphin v. United States, 809 F.2d 236, 238 (4th Cir.), cert. denied, 480 U.S. 935 (1987). Respondents' contention that enforcement should be denied because they are unrelated to Shapiro is plainly without merit for the reasons stated by the Court in its oral opinion of July 11, 1991. 26 U.S.C. §§ 7602(a)(2) and 7609 of the Internal Revenue Code clearly authorize the government to

investigate the potential tax liability of a taxpayer by issuing summonses to third parties like respondents.

As the government points out, the issues in this case are identical to those resolved in favor of the government at the July 11 hearing. The affairs of respondents are clearly relevant to the government's investigation of Shapiro. Respondents have advanced no new arguments which would persuade this Court to deny enforcement. Respondents have not met their burden of showing that enforcement would constitute an abuse of process or should not for other reasons be ordered by the Court.

For these reasons, the government's motion to enforce summonses will be granted. The Court will today enter the Order submitted by counsel for government granting the government's motion and directing that the summonses in question be enforced.

Very truly yours,

Alexander Harvey II
Senior Judge

cc: Deputy Clerk Lauman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE, MARYLAND

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| Petitioner | ) | |
| | ) | |
| vs. | ) | Civil No: 91-1549(H) |
| | ) | |
| NO NAME VIDEO, LTD., and SATTERFIELD INC., T/A ACCOUNTING ASSOCIATES and/or MS ENTERPRISES | ) | ORDER |
| | ) | |
| Respondents. | ) | |

ORDER

This matter having come before the Court on Respondent's Petition to Supplement the Record on Appeal, and the court having considered respondents' Motion and the petitioner's Opposition thereto, it is hereby

ORDERED, that the record on appeal be supplemented to include:

1. The transcript of the hearing held in Sanford R. Shapiro v. U.S.A., Civil Action Nos. H-91-933 and H-91-1223 held before this Court on July 12, 1991, and

2. A copy of the Order entered by this Court on September 12, 1991 in Civil Action 91-1549(H).

Dated at Baltimore, Maryland this 4th day of December, 1991.

Alexander Harvey II
JUDGE, U.S. District Court

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| SANFORD R. SHAPIRO<br>Plaintiff | * | Case Nos: |
| vs. | * | H-91-933 |
| UNITED STATES OF AMERICA<br>Defendant | * | H-91-1223 |
| ********** | | |
| UNITED STATES OF AMERICA<br>Plaintiffs | * | |
| vs. | * | H-91-1549 |
| NO NAME VIDEO LTD, et al.<br>Defendants | * | |

Motions hearing on the above captioned cases were held on July 11, 1991, before the Honorable Judge Alexander Harvey, II.

For the Plaintiff:

Robert D. Grossman, Jr., Esquire

For the Defendant:

Gregory S. Hrebiniak, Esquire

Reported by:

Barbara Shaulis

MR. GROSSMAN: No, Your Honor.

THE COURT: All right. Well, let's take a brief recess and then I will return and rule on these matters.

(Recess.)

(After recess.)

THE COURT: The Court will now rule on these matters.

There are two cases pending here this afternoon. Civil number H-91-933, and civil number H-91-1223. In each of these two cases, the plaintiff is Sanford Shapiro. And he has petitioned the Court to quash certain summonses which have been served on the third parties. As a result of the amended petition to quash, there are, in effect five summonses at issue which were served on Signet Bank, there were two on Signet Bank and Sear's Roebuck & Company, J.C. Penney Company, and Hecht's. The parties have briefed the issue, and the Government in turn has filed a

petition to, a motion to enforce in the first case, H-91-933, which raises some of the same questions as are raised by the petition to quash.

The parties have filed memoranda, exhibits and affidavits, and argument has been heard this afternoon in open court. For the reasons to be stated, the summonses at issue, all five of them will be enforced. The facts here need not be stated in any detail. They are well-known to the parties.

The unusual aspect of the facts are that Mr. Shapiro was convicted in this Court in 1983 31 of filing a willfully false tax declaration. He received a sentence which he served. He was on probation after service of his sentence. After his conviction, the plaintiff, Mr. Shapiro, married Maria Satterfield, who has retained the name Satterfield in spite of her marriage. Thereafter, there were bankruptcy proceedings.

The plaintiff received his discharge, and he asserts here that as a result of his conviction, incarceration and bankruptcy, he has resolved, quote, never again to own assets or earn income, end of quote. And he claims that he has become a house husband, supported by his spouse, Ms. Satterfield. I would note that several of the businesses have been started by Satterfield, including Accounting Associates, which is formerly MS Enterprises, Satterfield, Inc., and No Name Video, Limited. Satterfield, Inc. and No Name Video, Limited are the subject of a third action before me, which has, is procedurally not right for a decision today, and that was a suit brought by the United States, a petition to enforce a summons, naming as the respondents those two corporations.

It is apparent that the IRS is now investigating the potential tax liability of Shapiro for the years 1986 through 1989, and the summonses have purportedly been issued to

these third parties in connection with this investigation.

The Government has submitted in support of its position here the sworn declaration of Agent,

32

Special Agent Bell. Special Agent Bell states that he was assigned to investigate the income tax liability of plaintiff for these, for the original years, 1986 through 1988, and that the year 1989 has recently been added to the scope of his investigation.

Agent Bell has further stated that the investigation was referred to him by the Collection Division of the IRS, and he asserts that information sought for investigation of Shapiro's tax liability case, information relating to financial transactions of any kind, during these years, would be relevant to determine the potential income and expenditure amounts of the taxpayer for those years.

In support of his petition to quash, in

opposition to the Government's motion to enforce, Shapiro has submitted a number of affidavits executed by himself, by Satterfield, by an employee of Satterfield, and by one Julie Winiarski. The Court has reviewed those affidavits in making its determinations, as to whether or not the Government's motion to enforce should be granted or the Shapiro's petition to quash, or amended petition to quash should be granted.

I would note that counsel for Mr. Shapiro placed particular emphasis on the Winiarski affidavit, wherein it is stated that Winiarski was informed that Shapiro was on the IRS, quote, hit list, and counsel argues that this shows that

33

he has been selected arbitrarily and improperly for audit.

The Government, in replying on the declarations of Special Agent Bell claims that it has established a prima facie case, and it

argues that Shapiro then has the burden of showing that enforcement would be an abuse of process. The Government asserts that the fact that Shapiro claims to have no assets, and to do nothing for a living necessitates a reasonable inquiry into related entities to see if he is shielding income.

In opposition, Shapiro argues that the record in this case demonstrates that the IRS investigation amounts to harassment, is overbroad, and lacks a proper purpose. The Internal Revenue Code authorizes the IRS to investigate a taxpayer to determine the correctness of his returns or any tax liability by issuing a summons requiring any person to produce records in his or its possession concerning that taxpayer, 26 U.S.C., Section 7602 (a) (2). Section 7609 sets forth special procedures for summonses served on, quote, third party recordkeepers.

It is clear from the cases that this power conferred on the IRS may not be used for

an improper purpose such as to harass the taxpayer, to pressure him to settle a collateral dispute, or to gather information for criminal prosecution after the IRS has referred the case to the Department of Justice, see United States v. LaSalle National Bank, 437 U.S. 298, 318 (1978).

34

United States v. Powell, 379 U.S. 48, 58 (1964). See also, the Fourth Circuit case Alphin v. United States, 809 F.2d, 239, 238, Fourth Circuit cert. denied, 480 U.S. 935 (1987).

Under the code, a taxpayer is entitled to challenge summonses issued by the IRS in a proceeding such as this one. 26 U.S.C., see Section 7604 and 7609 (h) (1), and in a proceeding such as this one, to determine the enforceability of an IRS summons, the Government can establish a prima facie case for enforcement, by showing one, that the investigation is being conducted for a

legitimate purpose.

Two, that the inquiry may be relevant to that purpose. Three, that the information sought is not already within the possession of the IRS. And four, that administrative steps required by the Code have been followed. See Powell, 379 U.S. at 57 to 58. And the Government can demonstrate that these requirements have been met by submitting an affidavit or declaration executed by an agent involved in the investigation. Alphin, 809 F.2d at 238. But since a proceeding to determine the enforceability of an IRS summons is summary in nature, and since the Government need not satisfy a probable cause standard, the Government's burden is fairly slight. See the Alphin case I just cited.

Once the Government has established a prima facie case for enforcement, the taxpayer bears the heavy burden of disproving the actual

existence of a valid civil tax determination or for collection purpose, in order to show that enforcement would constitute an abuse of process. If a taxpayer submits affidavits, and demonstrates that the purpose of the investigation is improper, then he may be entitled to discovery, and an evidentiary hearing. However, in order to trigger the need for further investigation, such affidavits must quote, must particularize those specific facts from which an inference may be drawn that the conduct of the IRS was improper, end of quote. That is Hintze, H-I-N-T-Z-E v. United States, 879 F.2d, 121, 128, Fourth Circuit (1989). Quoting United States v. Garden State National Bank, 607 F.2d 61, 71, Third Circuit (1979).

Applying these principles to the facts of records in this case, this Court finds and concludes that these five summonses at issue must be enforced. The declaration of Special Agent Bell is clearly sufficient to establish

the elements of a prima facie case for enforcement under Powell.

Secondly, inquiry into the affairs of Shapiro and Satterfield and related entities is clearly related to and relevant to the investigation. Such an inquiry need not be

36

limited to the tax years under investigation, since records concerning a particular year, may shed light on prior income.

Thirdly, the declaration of Special Agent Bell establishes that the information sought is not already within the possession of the IRS, and finally, I am satisfied that proper administrative steps have been taken in this case.

So for these reasons, this Court concludes that the Government has set forth a prima facie case for enforcement of the summonses at issue. And Shapiro in turn has failed to counter this prima facie case by bearing his heavy burden of demonstrating that

enforcement would constitute an abuse of process. The affidavits submitted by Shapiro do not convince the Court that there are specific facts suggesting wrongful conduct on the part of the IRS. The fact that Shapiro was allegedly not contacted by the Collection Division of the IRS, and before the current investigation, does not suggest an improper purpose.

Likewise, the fact that the IRS automatically audits the tax returns signed by Shapiro is unremarkable since Shapiro has, in the past, practiced as an accountant. There is some question as to whether he was barred at a particular period in time from practicing before the IRS. But most significant of all here, is that Shapiro's financial situation is a most unusual one.

This cries out for investigation by the Government to determine if there has been a

37

shield of income and/or assets which would

suggest income going to Shapiro. The contentions that Shapiro makes concerning the relationship between him and his wife, rather than supporting his position, show what an unusual situation this is, where Mr. Shapiro has determined that no income at all will be received by him, yet apparently he lives a lifestyle which would suggest otherwise.

Of course, the merits of his assertions that he has no tax liability are not being reached here. All that the Court is determining is the propriety of the investigation which would be undertaken to determine what that liability may be. So for those reasons, the motions to quash second amended petition to quash, and in H-91-933 will be denied. At the time, defendant's motion to enforce the summons in H-91-933 will be granted. The amended petition to quash in 91-1223 will be denied. And I will enter an order to that effect, and see that counsel receive a copy of that.

Now, as far as the other case is concerned, if there is a question of service, can you do that here toady, so we can move that along? And I will assume that you can file some sort of a motion, perhaps based on some of these findings. There are different entities involved there, but these might be pertinent to that, and if you would file a motion for summary judgment on enforcement, and we could get counsel to

38

respond to that and see how we come out, because I had thought that perhaps that case might be up here today, but since there haven't been the proper pleadings, I guess we can't raise it.

All right. I will enter the order and send a copy to counsel. We stand adjourned.

(Court adjourned.)

* * * * * * * *

**APPENDIX B**

UNPUBLISHED

**UNITED STATES COURT**

**OF APPEALS**

FOR THE FOURTH CIRCUIT

United States of America; W. Donald Bell, Special Agent,
Petitioners-Appellees,

v. No: 91-2722

No Name Video, Limited; Satterfield, Incorporated, d/b/a MS Enterprises, d/b/a Accounting Associates,
Respondents-Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Alexander Harvey, II, District Judge.
(CA-91-1549-H)

Argued: June 3, 1992

Decided: October 19, 1992

Before ERVIN, Chief Judge, WILLIAMS, Circuit Judge, and TILLEY, United States District Judge for the Middle District of North Carolina, sitting be designation.

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Affirmed by unpublished per curiam opinion.

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## COUNSEL

**ARGUED:** Robert Doran Grossman, Jr., ROBERT GROSSMAN, JR., P.C., Bethesda, Maryland, for Appellants. Charles Edward Brookhart, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. ON BRIEF: Eric Horvitz, ROBERT GROSSMAN, JR., P.C., Bethesda, Maryland, for Appellants. James R. Bruton, Acting Assistant Attorney General, Gary R. Allen, Annette M. Wietecha, Joel A. Rabinovitz, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Richard D. Bennett, United States Attorney, Baltimore, Maryland, for Appellees.

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Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

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## OPINION

PER CURIAM:

Appellee, United States Internal Revenue Service (IRS), is investigating a possible tax liability of Sanford R. Shapiro for the years 1986-1989. The IRS issued summonses to Appellants No Name Video Ltd. and Satterfield, Inc. (the corporations) pursuant to 26 U.S.C. § 7602 (1988). When the corporations refused to produce the documents,

the IRS brought this action to enforce the summonses. The district court denied the corporations' motion to quash and granted enforcement. We now affirm.

I.

Affidavits before the trial court reveal that in March 1983, Shapiro was convicted of filing false tax returns for the years 1975 and 1976. In April, 1984, he married Maria Satterfield. He filed for bankruptcy in June 1985. No Name Video, Ltd. and Satterfield, Inc. (d.b.a. MS Enterprises and/or Accounting Associates) are wholly owned by Satterfield.

Shapiro is not an employee or officer of Satterfield's corporations, but a homemaker who runs errands for the corporations, dictates correspondence, gets information from the corporations' clients, and prepares tax returns. He signs the tax returns Satterfield prepares and he signs most company checks because Satterfield has arthritis and he is

able to sign more neatly. He and Satterfield further aver that Shapiro has not contributed to her assets and that she owns their home and various accounts herself.

A client of Accounting Associates, Julie Winiarski, was told by Milton Friedman, an IRS Appeals Officer investigating her return, that Shapiro was on the "hit list." She understood this list to be 15 to 20 tax preparers whose customers' returns are singled out for auditing. Friedman told her it would be in her "best interests to have someone else prepare" her tax returns and that her return had been audited because she was an Amway distributor.

The IRS suspects Shapiro of hiding income. Shapiro and Satterfield filed joint returns for 1986 and 1988 and reported taxable income for either year. Neither their 1987 nor their 1989 return was received by the IRS. Its investigation of Shapiro for the years 1986-1989 included summonses to Satterfield's

bank and department store accounts and to her two corporations -- No Name Video and Satterfield, Inc.

On June 4, 1991, the IRS brought this action to enforce the summonses against No Name Video and Satterfield, Inc. Shapiro had previously brought two suits to quash the summonses directed at his wife's bank and store accounts. On July 11, 1991, the district court heard arguments concerning the bank and store accounts (captioned Shapiro v. United States, numbered H-91-933 and H-91-1223), denied the motions to quash, and ordered enforcement. At the July 11 hearing, Shapiro disputed any business connection between himself and his wife's two corporations. Although the parties discussed the propriety of the summons issued to the two corporations, the matter was not decided because it was not ripe for review.

In August 1991, the district court reviewed the government's motion and

declaration to enforce the summons against the corporations as well as the corporations' response in opposition. Although Shapiro was not a party, the corporations attempted to raise some of the same defenses which Shapiro had raised in the earlier cases, such as the claim that the summonses were issued for purposes of harassment. The corporations also opposed the summonses on the grounds that the material sought was irrelevant and overbroad. On September 12, 1991, the district court granted enforcement without a hearing, commenting that the corporations had "advanced no new arguments which would persuade the Court to deny enforcement." Joint Appendix 28-29.

II.

A.

To enforce a tax summons issued pursuant to 26 U.S.C. § 7602, the IRS must make a minimal showing of the four elements of a prima facie case: that the information is

sought for a legitimate purpose, that the information is relevant for that purpose, that the information is not possessed by the IRS, and that the information is sought following proper procedures. United States v. Powell, 379 U.S. 48 (1964); Alphin v. United States, 809 F.2d 236, 238 (4th Cir.), cert. denied, 480 U.S. 935 (1987).

The government's burden at this stage of the summary proceeding is a light one. Hintze v. IRS, 879 F.2d 121, 126 (4th Cir. 1989). Indeed, the IRS need only present "an affidavit of an agent involved in the investigation averring the Powell good faith elements" in order to establish a prima facie case for enforcement of a civil summons. Id. (quoting Alphin, 809 F.2d at 238). If the government succeeds in establishing a prima facie case for enforcement, the burden shifts to the party challenging the summons. Unlike the slight burden shouldered by the government in its prima facie case, however, the burden

on the challenging party is a very heavy one. Id. at 126-27 and cases cited therein. The challenger must "disprov[e] the actual existence of a valid civil tax determination or collection purpose." Id. at 126 (quoting Alphin, 809 F.2d at 238); see also United States v. LaSalle Nat'l Bank, 437 U.S. 298, 316 (1978).

The district court has discretion whether to conduct an evidentiary hearing in connection with summons enforcement proceedings. Hintze, 879 F.2d at 126 (4th Cir. 1989). Evidentiary hearings are by no means automatic to the challenger. As we stated in Hintze:

> [O]nce the government has carried its initial burden to establish a prima facie case for enforcement, a party challenging IRS summonses will be entitled to an adversary hearing only upon the production of some substantive evidence corroborating the claim of abuse.

Id. at 126-27 (emphasis supplied). See also

Alphin, 809 F.2d at 238 (it is proper for district court to dispose of the proceeding on the papers and without an evidentiary hearing if the challenging party cannot refute the government's prima facie case with specific facts permitting an inference of some wrongful conduct by IRS).

B.

Applying these standards to the facts of this case, we agree with the implicit holding of the district court that the IRS established a prima facie case for enforcement of the challenged summonses. The declaration of IRS special agent W. Donald Bell stated: (1) the agent Bell was assigned to investigate the potential income tax liabilities of Shapiro; (2) that the information sought from No Name and Satterfield, Inc. is necessary for the investigation of Shapiro as Shapiro "is disclaiming any interest in any business or in income from any commercial enterprise and yet there is reason to believe he is actively

engaged in the accounting business;" (3) that the "information sought...is not in the possession of the Internal Revenue Service;" and (4) that Bell had followed "[a]ll of the relevant provisions of the Internal Revenue Code ... with respect to issuing, serving and giving notice of the summonses." Joint Appendix at 15-18. Since the IRS carried its threshold burden under Powell and Alphin, the burden shifted to the corporations to come forth with sufficient evidence of administrative abuse such that the district court should have either quashed the summonses or permitted an adversarial hearing on the matter.

After reviewing the record, we conclude that appellants have not offered any particularized facts to refute the IRS's prima facie case. The corporations first challenge the summonses on the ground that the materials sought are not relevant to an investigation of Shapiro because none of their financial

records regard Shapiro. Section 7602 of the Internal Revenue Code gives the IRS authority to investigate the potential tax liability of a taxpayer through the use of summonses to third parties such as corporations. 26 U.S.C. § 7602.[1] This provision of the Code has been given an expansive reading to enable the IRS to perform its responsibilities to enforce the Tax Code as mandated by Congress. United States v. Arthur Young & Co., 465 U.S. 805, 816 (1984) (section 7602 give IRS "expansive information-gathering authority"); United States v. Euge, 444 U.S. 707 (1980); Hintz v. IRS, 879 F.2d 121 (4th Cir. 1989).

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[1] Section 7602 reads in relevant part:

> (a)....For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax...the Secretary is authorized --
>
> > (1) To examine any books, papers, records, or other data which may be relevant or materials to such an inquiry;....

26 U.S.C. § 7602 (1988) (emphasis added).

Furthermore, the threshold for determining relevance in a Section 7602 summons is a low one. The Supreme Court has approved a minimal test for relevance -- whether the data "might throw light" upon the correctness of a return. United States v. Arthur Young & Co., 465 U.S. at 813-15 & n.11. As the Supreme Court explained:

> The language "may be" [in section 7602] reflects Congress' express intention to allow the IRS to obtain items of even potential relevance to an ongoing investigation.... The purpose of Congress is obvious: the Service can hardly be expected to know whether such data will in fact be relevant until they are produced and scrutinized. Id. at 814.

Judged from the broad grant of authority to the IRS under Section 7602 and the low threshold of relevance, the material sought from the two corporations is relevant to the investigation of the potential tax liability of Shapiro. Shapiro claims that he earns no income and is not engaged in the

accounting business owned by his wife. The IRS is suspicious of Shapiro's actual involvement in the corporations, pointing to the fact that Shapiro's signature appears on returns which have been prepared on behalf of clients of one of the corporations. The appellants' argument rests on the assumption that the corporations have no financial relationship with Shapiro, an assumption that cannot be proven without the aid of the documents the IRS seeks through the summonses. Section 7602 enables the IRS to review documents and records from the corporations to determine the veracity of Shapiro's claims and any potential tax liability.

The corporations' second challenge to the summonses, related to the first, is that the summonses are overbroad. Specifically, the corporations object to the inclusion of client lists and ledgers, which they claim will threaten their businesses. Based on the above discussion of the grant of authority to

the IRS in Section 7602 and the broad notion of relevance, we conclude that the client lists satisfy the test for relevance. The IRS is suspicious of Shapiro's claimed volunteer work for the corporations and has reason to believe the Shapiro is actively engaged in the accounting business. Discussions with clients of the corporations regarding business contact, if any, with Shapiro will aid the IRS in its investigation of Shapiro's involvement with the corporations and any potential tax liability.

The corporations' third and underlying challenge to the summonses is that the IRS had an improper purpose for the tax summonses: "to harass Shapiro and destroy his wife's businesses." Appellant's Brief at 7. See Powell, 379 U.S. at 58. This claim is based on the belief that Shapiro is on an IRS "hit list." The corporations have submitted two affidavits that make reference to Shapiro's presence on an IRS "hit list."

After reviewing the affidavits as well as the entire record, we conclude that neither corporation has offered any particularized facts which demonstrate such an improper IRS motive. Mere allegations are insufficient to meet the burden of refuting the IRS's prima facie case. See Hintze, 879 F.2d at 128 ("[a]llegations supporting a 'bad faith' defense are ... insufficient if conclusionary," quoting from United States v. Garden State Nat'l Bank, 607 F.2d 61, 71 (3rd Cir. 1979); Alphin, 809 F.2d at 238 (heavy burden to refute IRS prima facie case). The Shapiro affidavit is a mere allegation of bad faith on the part of the IRS. The Winiarski affidavit likewise fails to particularize facts supporting an inference of abuse. The affidavit states that during a meeting between the Winiarskis and IRS Appeals Officer Milton Friedman, Friedman told the Winiarskis that Shapiro was on a "hit list," explained as "a list of ten to twenty tax preparers whose

client's returns were selected for examination by the Internal Revenue Service o the sole basis ... that those on the 'hit list' were the preparers." According to the affidavit, Mr. Friedman told the Winiarskis that it would be in their best interests to have someone else prepare their returns. As a result of the statements from Mr. Friedman, Winiarski stated that she is "extremely concerned about continuing to use Accounting Associates as my accountants." While there may be some incidental loss to appellants' businesses by virtue of the IRS investigation of Shapiro, such loss is merely speculative and is not evidence that the IRS is pursuing its investigation of Shapiro in bad faith.

Finding that the corporations have not come forth with particularized facts of bad faith by the IRS is issuing summonses to the corporations, we cannot conclude that the district court abused its discretion or

committed "clear error" in enforcing the summonses without a hearing.

C.

Aside from attacking elements of the IRS's prima facie case, Appellants complain about the district judge referring to the July 11 hearing on Shapiro's motion to quash other summonses and noting that the corporations had "advanced no new arguments which would persuade the Court to deny enforcement" here. The corporations contend the trial court should not have considered the record developed in the earlier hearing because the present summonses were not before it when it rules in these two suits.

We think that the district court was justified in examining the prior hearing, along with the new arguments, in coming to its decision in the instant case. First, the

district judge examined the total record before it and made independent findings of fact based on all the evidence. Second, the July hearing involved the same investigation, the same agent, and the same group of summonses at issue in this case. For example, the July hearing already explored and dismissed the claim that the IRS had an improper purpose to harass Shapiro personally. Had Shapiro been a party to this action, principles of collateral estoppel would have precluded his relitigating those issues decided in the earlier actions. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). The July hearing also addressed Shapiro's involvement with the corporations. Because of the interrelatedness of the summonses and the parties, we conclude that the district judge was justified in examining the record of the July hearing in coming to an independent decision in this case. Such a practice is consistent with the goal of concluding summons

enforcement proceedings quickly, so that the IRS's investigation will not be delayed. See United States v. Barrett, 837 F.2d 1341, 1349 (5th Cir. 1988), cert. denied, 429 U.S. 926 (1989) (summons enforcement proceedings are "intended to be summary in nature"). It is also consistent with the court's obligation to ensure that its process is not being abused. United States v. Powell, 379 U.S. 48, 58 (1964). Furthermore, by reviewing the record of a closely related matter, the court conserved scarce judicial resources. We cannot conclude that the district judge committed reversible error in looking to the July hearing as part of all of the evidence in determining that appellants had failed to rebut the government's prima facie case for enforcement of the summonses.

III.

IRS has made its prima facia for enforcement of the summonses; Appellants have

not demonstrated that the trial court was clearly erroneous to grant enforcement. Hintze v. IRS, 879 F.2d 121, 125 (4th Cir. 1989). We affirm.

AFFIRMED

Supreme Court, U.S.
FILED
MAR 22 1993
OFFICE OF THE CLERK

No. 92-1212

# In the Supreme Court of the United States

OCTOBER TERM, 1992

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NO NAME VIDEO, LTD., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

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## QUESTION PRESENTED

Whether the district court abused its discretion in enforcing two Internal Revenue Service summonses without conducting an evidentiary hearing when petitioners failed to offer evidence in support of their allegation that the summonses were issued for an improper purpose.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 4 |
| Conclusion | 9 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Alphin* v. *United States*, 809 F.2d 236 (4th Cir.), cert. denied, 480 U.S. 935 (1987) | 5 |
| *Chen Chi Wang* v. *United States*, 757 F.2d 1000 (9th Cir. 1985) | 4 |
| *Copp* v. *United States*, 968 F.2d 1435 (1st Cir. 1992), cert. denied, No. 92-827 (Feb. 22, 1993) | 5, 7 |
| *Donaldson* v. *United States*, 400 U.S. 517 (1971) | 4 |
| *Hintze* v. *United States*, 879 F.2d 121 (4th Cir. 1989) | 4 |
| *Spalding* v. *Spalding*, 94 N.W.2d 810 (Mich. 1959) | 8 |
| *Tiffany Fine Arts* v. *United States*, 469 U.S. 310 (1985) | 7, 8 |
| *United States* v. *Balanced Financial Managment, Inc.*, 769 F.2d 1440 (10th Cir. 1985) | 5 |
| *United States* v. *Church of Scientology of California*, 520 F.2d 818 (9th Cir. 1975) | 5, 6 |
| *United States* v. *Harris*, 628 F.2d 875 (5th Cir. 1980) | 5, 6, 7 |
| *United States* v. *Kis*, 658 F.2d 526 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1992) | 5, 8 |
| *United States* v. *McCarthy*, 514 F.2d 368 (3d Cir. 1975) | 5, 6 |
| *United States* v. *National Bank*, 622 F.2d 365 (8th Cir. 1980) | 5 |
| *United States* v. *Salter*, 432 F.2d 697 (1st Cir. 1970) | 5, 6 |
| *United States* v. *Samuels, Kramer & Co.*, 712 F.2d 1342 (9th Cir. 1983) | 7 |
| *United States* v. *Southeast First National Bank, Etc.*, 655 F.2d 661 (5th Cir. 1981) | 7 |

Cases—Continued

Page

*United States* v. *Tiffany Fine Arts, Inc.*, 718 F.2d 7 (2d Cir. 1983), aff'd, 469 U.S. 310 (1985) ..... 5
*United States* v. *Will*, 671 F.2d 963 (6th Cir. 1982) ..... 4
*United States* v. *Wright Motor Co.*, 536 F.2d 1090 (5th Cir. 1976) ..... 7

Statute:

Internal Revenue Code, 26 U.S.C. 7602 ..... 2

# In the Supreme Court of the United States

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NO NAME VIDEO, LTD., ET AL., PETITIONERS

*v.*

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---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22-42) and the opinion and order of the district court (Pet. App. 1-5) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on October 19, 1992. The petition for a writ of certiorari was filed on January 19, 1993 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In the course of an investigation into the income tax liabilities of Sanford Shapiro (taxpayer) for the taxable years 1986 through 1989, Internal Revenue Agent W. Donald Bell issued summonses to No Name Video, Ltd. and Satterfield, Inc. (petitioners), two corporations that were owned by taxpayer's wife, Maria Satterfield (Pet. App. 24-25). The summonses were issued pursuant to 26 U.S.C. 7602. They directed petitioners to appear, give testimony and produce their records for the period of January 1, 1986, through January 31, 1990 (Pet. App. 1-2).

2. When petitioners failed to comply, the United States filed a petition to enforce the summonses (Pet. App. 24-25). Petitioners opposed enforcement, arguing that the summonses were issued in bad faith and that the exclusive purpose for the IRS's investigation was to harass and embarrass taxpayer and his wife (*id.* at 36).

The district court rejected petitioners' contention and granted the government's motion for enforcement. The court declined to hold an evidentiary hearing on petitioners' allegations (Pet. App. 1-5). The court relied upon the record before it on the motion to enforce, as well as the record in a preceding case brought by taxpayer to quash five Internal Revenue summonses issued in connection with the same investigation (*id.* at 4). In the earlier case, the taxpayer had also contended that the IRS was conducting its investigation for an improper purpose (*id.* at 13). In support of his argument in that case, the taxpayer had submitted the affidavit of Julie Winiarski, a client of Satterfield, Inc., which stated

that the IRS told her that taxpayer had been placed on an IRS "hit list" of accountants whose clients' tax returns automatically would be selected for audit (*ibid.*). The district court had ordered enforcement of the summonses in the earlier case, without conducting an evidentiary hearing, because the affidavits submitted by taxpayer "[did] not convince the Court that there are specific facts suggesting wrongful conduct on the part of the IRS" (*id.* at 19).

In the present case, the district court, after considering the record of the prior litigation and reviewing the affidavit of the Internal Revenue Agent in charge of the investigation, found that the Internal Revenue Service had made a *prima facie* showing for enforcement of the summonses, which petitioners failed to rebut (Pet. App. 4). The court held that petitioners failed to advance any new arguments that would persuade the court that enforcement of the summonses would constitute an abuse of process (*id.* at 5).

3. The court of appeals affirmed (Pet. App. 22-42). The court concluded that petitioners did not bear their burden of establishing that the district court committed clear error in finding that the IRS had issued the summonses in good faith (*id.* at 42). The court of appeals also rejected petitioners' argument that the district court abused its discretion in enforcing the summonses without conducting an evidentiary hearing (*id.* at 38-39). The court held that a hearing was not required because petitioners failed to make a sufficient threshold showing that there was an improper purpose behind the summonses and did not "come forth with particularized facts of bad faith

by the IRS i[n] issuing summonses to the corporations" (*id.* at 38).

## ARGUMENT

The court of appeals correctly concluded that the district court did not abuse its discretion in enforcing the summonses without conducting an evidentiary hearing. The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Summons enforcement proceedings are designed to be summary in nature. See *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971).* While a district court may, in the exercise of its discretion, allow the taxpayer an evidentiary hearing to substantiate his allegations and supplement offers of proof that the summons was not issued in good faith, the "right to an adversary hearing * * * is not absolute." *Hintze* v. *IRS*, 879 F.2d 121, 126 (4th Cir. 1989). Whether an evidentiary hearing should be conducted in the course of summons enforcement proceedings "is a matter committed to the sound discretion of the district court. There is no requirement that the court conduct such a hearing or permit discovery in each and every case. * * * [A] party challenging IRS summonses will be entitled to an adversary hearing only upon the production of some substantive evidence corroborating the claim of abuse." *Id.* at 126-127. See

* It is well settled that district courts may limit discovery in such proceedings. *Chen Chi Wang* v. *United States*, 757 F.2d 1000, 1004 (9th Cir. 1985); *United States* v. *Will*, 671 F.2d 963, 967-968 (6th Cir. 1982).

also *Copp* v. *United States*, 968 F.2d 1435, 1438 n.1 (1st Cir. 1992), cert. denied, No. 92-827 (Feb. 22, 1993); *Alphin* v. *United States*, 809 F.2d 236, 238 (4th Cir.), cert. denied, 480 U.S. 935 (1987); *United States* v. *Balanced Financial Management, Inc.*, 769 F.2d 1440, 1444 (10th Cir. 1985) (taxpayer must factually refute the government's showing or support a proper affirmative defense before evidentiary hearing is granted); *United States* v. *Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983) (only where a taxpayer has made a "substantial preliminary showing" of abuse of process is he entitled to an evidentiary hearing), aff'd, 469 U.S. 310, 324 n.7 (1985); *United States* v. *Kis*, 658 F.2d 526, 539 n.39 (7th Cir. 1981) ("This hearing is not, however, automatic. * * * [T]he taxpayer must make some threshold showing to be entitled to the hearing."), cert. denied, 455 U.S. 1018 (1982); *United States* v. *National Bank*, 622 F.2d 365, 367 (8th Cir. 1980) ("An evidentiary hearing is necessary only where substantial deficiencies in the summons proceedings are raised by the party challenging the summons.").

2. Petitioners err in contending (Pet. 14-17) that the decision in this case conflicts with *United States* v. *McCarthy*, 514 F.2d 368 (3d Cir. 1975), *United States* v. *Salter*, 432 F.2d 697 (1st Cir. 1970), *United States* v. *Harris*, 628 F.2d 875 (5th Cir. 1980), and *United States* v. *Church of Scientology of California*, 520 F.2d 818 (9th Cir. 1975), with respect to the threshold showing that must be made in order for a summoned party to obtain an evidentiary hearing.

In *United States* v. *McCarthy*, the court explained that "not every summons enforcement proceeding

will require an evidentiary hearing * * * [and that] if the person summoned neither puts in issue allegations of the complaint nor raises proper affirmative defenses, no evidentiary hearing will be required; the matter can be decided on the pleadings." 514 F.2d at 373. Although the Third Circuit afforded the taxpayer an evidentiary hearing in *McCarthy*, it did so only after concluding that the allegations raised "the possibility that the IRS agents charged with the investigation of defendant-corporation had no intention of pursuing any civil remedies as to bring into question their good faith" and the "defendant's allegations sufficiently raised the possibility that enforcement of the summons would result in a [prohibited] second inspection." *Id.* at 375-376. The decisions in *United States* v. *Salter*, 432 F.2d at 699-700 (facts alleged by respondent raised possibility of improper purpose on part of IRS), *United States* v. *Harris*, 628 F.2d at 880 (district court did not abuse discretion in holding evidentiary hearing, even though allegation that sole purpose of investigation was in aid of criminal prosecution was not raised in "preferred method" of supporting affidavit), and *United States* v. *Church of Scientology of California*, 520 F.2d at 825 (allegations of bad faith harassment "though thin, raised sufficient doubt about the Service's purposes to require the district court to hold a *limited* evidentiary hearing"), are to the same effect.

Those decisions manifestly do not support petitioners' proposition that the summoned party is entitled to an evidentiary hearing "upon alleging bad faith on the part of the IRS and without the necessity

of alleging particularized facts relating to the IRS motivation" (Pet. 16-17). Instead, those cases recognize that a party seeking an evidentiary hearing must make a sufficient showing of *facts*—not conclusory allegations—from which a court may infer a possibility of some wrongful conduct by the government. The courts held in those cases that the summoned parties *had* met their burden of showing facts that raised sufficient doubt regarding the agency's purpose in issuing the summonses to warrant further evidentiary inquiry. By contrast, in the present case, the district court concluded that petitioners had failed to rebut the affidavit signed by the Internal Revenue Agent detailing the proper basis for the summonses. On this record, the district court correctly deter-mined that no evidentiary hearing was required (Pet. App. 4-5).

3. District court decisions to enforce a summons without a hearing are reviewable under the abuse of discretion standard. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 324 n.7 (1985); *Copp* v. *United States*, 968 F.2d at 1438 n.1; *United States* v. *Samuels, Kramer & Co.*, 712 F.2d 1342, 1348 (9th Cir. 1983); *United States* v. *Southeast First National Bank, Etc.*, 655 F.2d 661, 667-668 (5th Cir. 1981); *United States* v. *Harris*, 628 F.2d 875, 883-884 (5th Cir. 1980); *United States* v. *Wright Motor Co.*, 536 F.2d 1090, 1094 n.1 (5th Cir. 1976). "In order to have an 'abuse' [of discretion] in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of judgment but defiance thereof, not the exercise of reason but

rather of passion or bias." *Ibid.* (quoting *Spalding* v. *Spalding*, 94 N.W.2d 810, 811 (Mich. 1959)).

Petitioners failed to offer any evidence of deficiencies in the summons process. Nevertheless, they maintain that they were entitled to an evidentiary hearing so they could show that the IRS issued the summonses solely to harass and embarrass taxpayer and his wife, and that the summonses should therefore be quashed. In support of this argument, petitioners allege that the affidavit of Julie Winiarski —which stated that she was "extremely concerned about continuing to use Accounting Associates as [her] accountants" (Pet. App. 38)—constitutes evidence of an improper purpose on the part of the IRS. This contention is baseless. As the court of appeals correctly explained, "[w]hile there may be some incidental loss to appellants' businesses by virtue of the IRS investigation of Shapiro, such loss is merely speculative and is not evidence that the IRS is pursuing its investigation of Shapiro in bad faith" (*ibid.*).

There is no requirement that an evidentiary hearing be held when a taxpayer does not "develop facts from which a court might *infer a possibility* of some wrongful conduct by the Government." *United States* v. *Kis*, 658 F.2d at 540. The courts below correctly concluded that petitioners failed to meet that requirement in this case. The district court thus did not abuse its discretion in disposing of the case without an evidentiary hearing. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. at 324 n.7.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1993

No. 92-1212

IN THE

# *Supreme Court of The United States*

OCTOBER TERM, 1992

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NO NAME VIDEO, LTD., ET AL.

*Petitioners,*

*VS.*

UNITED STATES OF AMERICA, ET AL.

*Respondents.*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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**REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION**

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## TABLE OF CONTENTS


Page

Table of Authorities. . . . i

THERE IS A CONFLICT AMONG THE VARIOUS CIRCUIT COURTS OF APPEAL AS TO THE STANDARD TO BE APPLIED IN DETERMINING A PARTY'S RIGHT TO AN EVIDENTIARY HEARING IN A SUMMONS ENFORCEMENT ACTION . . . . 1

Conclusion . . . . . 6


## TABLE OF AUTHORITIES

### Cases


Alphin v. U.S., 809 F.2d 236 (4th Cir. 1987), cert denied, 480 U.S. 935 (1987) . 2, 3, 5

United States v. Harris, 628 F.2d 875 (5th Cir. 1980) . . . . . 4, 5

United States v. Kis, 658 F.2d 526, cert. denied, 455 U.S. 1018 (1982) . . 2, 5

United States v. Salter, 432 F.2d 697 (1st Cir. 1970) . . . . . 4, 5

United States v. Southeast First National Bank of Miami Springs, 655 F.2d 661 (5th Cir. 1981) . . . . . 2, 3, 5

No. 92-1212

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

NO NAME VIDEO, LTD., ET. AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET. AL.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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# REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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## ARGUMENT

### THERE IS A CONFLICT AMONG THE VARIOUS CIRCUIT COURTS OF APPEAL AS TO THE STANDARD TO BE APPLIED IN DETERMINING A PARTY'S RIGHT TO AN EVIDENTIARY HEARING IN A SUMMONS ENFORCEMENT ACTION

The Petitioners in their petition argued that there is a conflict among the various circuit courts of appeal with respect to when the recipient of an IRS administrative summons (the "summonee") is entitled to an

evidentiary hearing. Petitioners contend that some courts guarantee a summonee the right to an evidentiary hearing upon merely alleging that the IRS issued the summons for an improper purpose (the "Mere Allegation Standard"), while other courts require the production of particularized facts (the "Particularized Fact Standard"). In its brief in opposition, Respondent contends that Petitioners have erred and that there is no conflict among the circuits. (Resp at 5).

In Alphin v. United States, 809 F.2d 236 (4th Cir. 1987), cert. denied, 480 U.S. 935 (1987) the Fourth Circuit recognized the existence of the conflict, as is evident from the following passage:

> In order to be entitled to a hearing, the party challenging the summons must allege specific facts in its responsive pleadings, supported by affidavits, from which the court can infer a possibility of some wrongful conduct by the IRS. . . . "Mere allegations of bad faith will not suffice." [citing] United States v. Kis, 658 F.2d 526, 539 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982) [(other supporting citations omitted)] But see, United States v. Southeast

> First National Bank of Miami Springs, 655 F.2d 661, 667 (5th Cir. 1981)([mere] allegation of improper purpose sufficient to trigger limited hearing). Alphin at 238.

In the Southeast case, a taxpayer urged the court to quash a summons issued to a third party recordkeeper on the ground that it was issued for an improper purpose (i.e. solely to gather evidence for a criminal prosecution). The taxpayer failed to provide any factual support for this allegation and asked the court for leave to conduct discovery. The court refused to permit the taxpayer to conduct discovery or to question the IRS agent at an adversary hearing. Southeast at 662-663.

On appeal the taxpayer argued that "the district court's refusal to provide an evidentiary hearing deprived him of a fair opportunity to substantiate [his] claim." In its response, the IRS argued that no hearing was required "because the taxpayer never offered facts in support of his bald,

conclusory allegations of improper purpose. . . ." The court rejected the IRS' argument and held that the taxpayer was entitled to a hearing. Southeast at 665.

In explaining its holding, the court adopted the logic set out in footnote 6 to United States v. Harris, 628 F.2d 875, 880 (5th Cir. 1980), which was cited by the Petitioners at pages 15 to 16 of their petition. "For these reasons, [the court held] that a [mere] allegation of improper purpose is sufficient to trigger a limited adversary hearing where the taxpayer may question IRS officials concerning the Service's reasons for issuing the summons." Southeast at 666.

In Harris, the court adopted a procedure to be employed in summons enforcement actions. Ironically, this procedure was recommended by the government in United States v. Salter, 432 F.2d 697, 700 (1st Cir. 1970).

> The Salter court recognized that the general solution to the taxpayer's need for discovery is for the district court to proceed directly to a hearing at which, if desired, the summonee could examine the agent who issued the summons, concerning his purpose. The court could then, by observation and where necessary, its own questioning of the agent, make its own determination of whether exploration, as by discovery, seemed to be in order. See, Harris at 881, citing Salter at 700.

The Seventh Circuit also recognized the conflict. Kis at 539-540.

In summary, the "Mere Allegation Standard" is applied in the First and Fifth circuits (See Salter, Harris and Southeast First National Bank) while the "Particularized Fact Standard" is applied in the Fourth and Seventh circuits (See Alphin and Kis).

In the instant case, the Petitioners offered two affidavits in support of their assertion that the IRS had issued the summons in bad faith, for the improper purpose of harassment. In one of the affidavits, Sanford Shapiro, the taxpayer and the target

of the criminal investigation, specifically alleged that the summons was issued in bad faith for the purpose of harassment. (Pet. App. 14, 28, 36-37). Under the "Mere Allegation Standard", Shapiro's affidavit is sufficient to entitle the Petitioners to an evidentiary hearing.

## CONCLUSION

For the foregoing reasons, Petitioners pray that this Court grant their Petition for Writ of Certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in United States of America and Special Agent W. Donald Bell v. No Name Video, Ltd. and Satterfield Inc., t/a Accounting Associates and/or MS Enterprise.

Respectfully submitted,

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